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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARLO HEMPSTEAD, Defendant and Appellant.	B202229 (Los Angeles County Super. Ct. No. LA054239)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randy Rhodes, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Marlo Hempstead (appellant) of second degree commercial burglary (Pen. Code, § 459)[1] (count 1) and grand theft of personal property (§ 487, subd. (a)) (count 2). The jury found that appellant had suffered one prior conviction for which he served a prison term. (§ 667.5, subd. (b).) The trial court sentenced appellant to a total of three years in state prison, consisting of the midterm of two years for the burglary and a consecutive year for the prison prior. The trial court stayed the term on count 2 pursuant to section 654.

Appellant appeals on the grounds that: (1) shackling him during trial and while he was representing himself at trial violated his state and federal constitutional rights to due process, a fair trial, and the presumption of innocence; (2) by refusing to grant a continuance during the trial, the trial court abused its discretion and violated appellant's rights to a fair trial and due process under the California Constitution and the Sixth and Fourteenth Amendments to the United States Constitution; and (3) the trial court prejudicially erred when it unreasonably restricted the cross-examination of a material witness.

FACTS

We view the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Cheri Forbes (Forbes) was working in the campus bookstore of Los Angeles Valley College on December 5, 2006, when she noticed appellant in the mathematics section, which was located toward the back of the store. Appellant was wearing an oversized dusty rose or mauve sweatsuit. She continued her tasks and, some time later, she noticed appellant was still there. She next saw appellant when he began to pass through the unmanned cash register aisle in the front of the store. Forbes saw that appellant had a box-shaped protrusion in his pants and shirt, and she told him to stop. Appellant was walking toward the front door to leave the store.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

Forbes told appellant that he needed to give back the books, and appellant insisted the books were his. Forbes replied, "'Not the books underneath your shirt.'"

When appellant reached for his backpack, Forbes was able to see the bindings of the books hidden in appellant's clothing. She told the cashier to call the police because appellant was stealing textbooks. Forbes took a good look at appellant so that she could later identify him. She told appellant that he had to stop and that she was serious. Appellant stared at her for a second and bolted out the door. Forbes pursued him.

Appellant ran across campus with one arm clutching his groin area. He entered a building and went into a men's bathroom. Forbes did not follow him inside the bathroom but asked someone in a nearby office to let security know where she and appellant were. She described a Black male wearing a dusty rose to mauve sweatsuit who had "corn rolls," a mustache, and a beard. When appellant exited the bathroom, Forbes pursued him again, and appellant ran out the back door.

As Forbes began to flag, one of the college vice-presidents took up the chase. Forbes did not see appellant again until she was asked to identify him. At that time, appellant was no longer wearing the red jumpsuit. He had on a completely different set of clothes. Soon afterwards, some books were brought to Forbes. She identified them and ascertained that their value was $653.13. Four of the books were the same algebra textbook, and the fifth was a trigonometry textbook.

John Noble (Noble), another bookstore employee, ran towards the campus swimming pool in the hopes of cutting off the path of the fleeing thief. At the pool, he saw appellant removing a red sweatsuit. Underneath, appellant wore a full set of clothes. Noble later lost sight of appellant. The sheriffs took Noble to identify a suspect approximately 15 minutes later, and he identified appellant.

Ronald Nohles was a deputy sheriff assigned to Los Angeles Valley College. He was called to investigate the burglary from the bookstore, and a dispatcher kept him informed of the places the suspect was running. The dispatcher eventually informed Deputy Nohles that three of his security officers were detaining a suspect in a parking lot.

When Deputy Nohles arrived, appellant had no books on his person. Deputy Nohles dispatched officers to the different locations where appellant had been seen. An officer found the books in a storage room in the Community Services Building. Another officer found a red hooded sweatshirt and red sweatpants at the swimming pool. Deputy Nohles sent an officer to the bookstore with the books to determine their selling price. Deputy Nohles arranged a field showup, and Forbes and Noble identified appellant as the suspect who ran from the bookstore. A third witness also identified appellant as the person she had been following.

DISCUSSION

I. Shackling

A. Appellant's Argument

Appellant argues that the use of physical restraints on a defendant during trial in the absence of a record of violence or threat of violence or other nonconforming conduct by the defendant is an abuse of discretion. Moreover, the trial court must make its own determination of the need for restraints and cannot rely upon the judgment of law enforcement officers. In the instant case, the trial court made no findings of a manifest need to shackle appellant, and there was no showing that appellant posed any risk.

According to appellant, the use of shackles upon him constituted an abuse of discretion, and an error of constitutional magnitude. Reversal is required unless the error was harmless beyond a reasonable doubt.

B. Relevant Authority

A defendant may be shackled when there is "'a manifest need'" to do so. The need may arise when the defendant is unruly, intends to escape or displays "'any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained . . . .'" (*People v. Cox* (1991) 53 Cal.3d 618, 651 (*Cox*), disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) *Cox* stated that the nonconforming conduct must be shown on the record and that the use of restraints without such a record would constitute an abuse of discretion. (*Cox, supra,*

at p. 651.) "A trial court abuses its discretion if it abdicates this decision-making responsibility to security personnel or law enforcement." (*People v. Hill* (1998) 17 Cal.4th 800, 841.)

C. No Abuse of Discretion or Constitutional Violation

There is no indication in the record that appellant was shackled during his trial. At the beginning of voir dire, the trial court stated, "Mr. Hempstead, I've asked my bailiffs to not handcuff you during the proceedings. Please don't give them reason to change my mind about that, okay?" Appellant replied, "You won't have any problem with me, Your Honor." There is no indication on the record that the trial court changed its mind. Appellant made no comment on being shackled until the day of the trial for his prior conviction allegation. Therefore, even assuming appellant was shackled during the guilt phase of his trial, which is far from evident, we agree with respondent that appellant has waived this issue on appeal.

The record shows that prior to the entrance of the jury on the day of the prior conviction trial, the court asked appellant if he wished to admit the priors, and appellant raised questions about the section 969(b) packet he had been given. The trial court explained to appellant that the jury would make any finding of inaccuracy in the packet. Appellant stated, "Well, see the problem that I have, as far as the jury, is explaining to the jury what I've been having with this court is where the bailiffs and—and this whole setting, me trying to explain my part, like when I was doing my closing argument." Appellant asked the deputy his name and continued, "When I was doing my closing argument, Deputy Ebert came all the way around the table in front of me and distracted me from even being able to talk because I felt like he was getting ready to grab me and put me into custody or something while in the middle of me talking. And there's a lot of things that I left out because of these distractions. And, you know, I understand that this is a court setting and you have to have certain things done here, but I am having a problem communicating under these circumstances. Just like right now. I am chained to the chair, the D.A. is standing up, walking around. I mean, these are all things that, you

know, it's not like I'm really being able to represent myself, you know, under these conditions."

The court explained to appellant that he was digressing into other issues and asserted that the bailiff had not walked in front of appellant during his closing argument. The court stated it was going to bring in the jury.

The hearing on the prison prior allegation proceeded, and the trial court sent the jury members to deliberate after closing arguments. The next entry on the record, which occurred outside the hearing and presence of the jury, was appellant's question to the trial court: "Your Honor, is there a reason *why I am being handcuffed*?" (Italics added.) The court replied that it was "a sheriff policy." Appellant stated, "It's almost impossible for me to be able to represent myself being handcuffed." Later the jury returned and entered the true finding on the allegation.

We believe that appellant's words reflect the fact that he was not shackled in the presence of the jury. It appears that he was handcuffed before the jury was allowed into the courtroom and after the jury left for deliberations. The prohibitions on physical restraints in the courtroom are limited to restraints placed in the jury's presence. (*People v. Duran* (1976) 16 Cal.3d 282, 290–291.) In this case, appellant was handcuffed only outside the jury's presence and *after* his conviction of the offenses, in accordance with section 688.[2] It does not seem logical that appellant would have feared the deputy was about to grab him if appellant were in shackles during his closing argument. A shackled defendant is not likely to flee.

Finally, contrary to appellant's assertion, we believe the evidence against him was overwhelming, as we discuss *post*. Under the circumstances in this case, we can find no abuse of discretion or violation of appellant's constitutional rights.

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[2] Section 688 provides: "No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge." (§ 688.)

II. Denial of Continuance

A. Appellant's Argument

Appellant, a propia persona defendant, contends that the trial court abused its discretion by denying his request for a continuance to subpoena an investigator to testify about fingerprint evidence. He states he was unable to subpoena the investigator earlier because of a lack of propia persona funds. And although the prosecutor would not stipulate to the fingerprint expert's report, she did not object to appellant calling the expert as a witness. According to appellant, he was prejudiced by the trial court's ruling, since the jury's request for substantial readback of testimony indicated they were unable to reach a decision. Therefore, the evidence against appellant was not viewed by the jury as being overwhelming.

B. Relevant Authority

Continuances are disfavored in criminal proceedings, and they are granted only upon a showing of good cause. (§1050, subds. (a) & (e).) A trial court has great latitude in deciding whether to grant a continuance once trial has begun. "'"The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his motion for a continuance cannot result in a reversal of a judgment of conviction.'" [Citations.] Entitlement to a midtrial continuance requires the defendant 'show he exercised due diligence in preparing for trial.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105–1106.) Continuances are granted only upon a showing of good cause. (§ 1050, subd. (e).)

C. Proceedings Below

After the People rested, the trial court asked appellant whether he planned to remain silent or to testify. The trial court stated that appellant was obviously not going to call any witnesses because appellant would have stated this at the start of trial. Appellant said he wanted to present exhibits to the jury. The trial court explained that there were certain ways documents are shown to the jury and appellant was clearly not aware of those. The trial court said it would give appellant until Monday at 10:00 to figure out how to present his documents, because the court could not help appellant. The trial court stated that, if there were no witnesses and appellant would not testify, the court was going to instruct the jury and allow closing arguments to commence. The trial court instructed appellant to prepare for these.

On the following Monday, the trial court and appellant discussed the jury instructions. Appellant again stated he wanted to present exhibits to the jurors. His exhibits consisted of a page documenting the fingerprint analysis of the books that were supposedly stolen from the store. The prosecutor explained to the trial court that fingerprints were lifted from the books and did not match appellant's. The prosecutor objected to admission of the document. If the People had known appellant wished to bring up the issue, the People would have brought in a witness to testify that the lack of appellant's fingerprints did not matter and to explain to the jury about fingerprints in general. The People believed that the document itself was hearsay and that defendant would have to call the fingerprint person, whom the People had not subpoenaed. The prosecutor suggested that appellant emphasize during argument that there was no fingerprint evidence.

The trial court agreed with the prosecutor that there was no foundation for appellant's document. Appellant needed a witness to testify to its authenticity and he did not have such a witness. Appellant said that the foundation was laid during the preliminary hearing and should carry over to trial. The trial court informed him that it "does not work that way." The court explained why it had to rule against admission of

the exhibit. The trial court could not help one side or the other. The trial court stated that, although the document was not admissible, appellant could argue whatever he wanted to argue about the fingerprints. Appellant said he understood, and went on to discuss jury instructions with the trial court.

Prior to the entry of the jurors, appellant informed the court that he wished to have a hearing under Evidence Code section 402. Appellant said he had spoken with the prosecutor who had suggested bringing Officer Nohles back to the stand. The prosecutor clarified that she had told appellant he would have to call someone from scientific services to testify, *if they were under subpoena to do that*. She would not object to the witness, but she did object to the piece of paper.

When the court pointed out that the People had rested, appellant said "Well, Your Honor, see, this is one of the issues that I did try to bring up. And I don't know if I—if you were aware of it. I did speak to Judge—Judge Taylor, and he said that he would be willing to put $10.00 on my books in order for me to make a call to a private investigator. I don't have any money on my pro per funds in order to call my investigator who did subpoena some witnesses for me, and if I had a chance to contact him, I would have asked him to subpoena this fingerprint specialist."

The court replied, "Well, it's not before me today now. No, your 402 is improperly timed, first of all. Second of all, People have rested, so I am not going to have any other witnesses. Especially if you don't have any witnesses under subpoena other than yourself. And I presume you're not testifying. Then we're done." Appellant stated, "Because, I mean—I mean, Judge Taylor did state that for the record. He did state he was going put [*sic*] $10.00 on my funds to I could make a call to the investigator because I had an investigator. He came down, visited me once, and he never come—came back." The court replied, "Thank you. That'll be noted for the record." The court called the jurors back in, and the defense rested.

D. Continuance Properly Denied

We find no abuse of discretion in the trial court's denial of appellant's eleventh-hour request for a continuance. As stated previously, in making a good-cause determination, the trial court must examine the circumstances of the case and consider the benefit the moving party anticipates from the continuance, the likelihood such a benefit will actually accrue, whether substantial justice will be accomplished, and the burden on the witnesses, jurors, and the court. (*People v. Fudge*, *supra*, 7 Cal.4th at pp. 1105–1106; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

As the previously cited authority indicates, the trial court must determine whether the continuance would be useful to the defendant. (*People v. Frye* (1998) 18 Cal.4th 894, 1013.) In this case, had appellant managed to obtain the testimony of the fingerprint analyst, it would have made no difference in the verdict. As the prosecutor explained to the trial court, if appellant had arranged to call a witness to testify about the lack of appellant's fingerprints on the textbooks, the prosecutor would have called an expert witness to explain about fingerprint evidence in general, and how a negative result for a particular suspect was insignificant. We observe that the jury would also have been aware of the opportunity appellant had to wipe fingerprints from the books when he hid in the men's room or when he placed them in the storage closet.

On the other hand, the burden on the jurors and the court by having to wait until an investigator was contacted and the parties' witnesses were subpoenaed was great. The prosecutor stated that she would not object to appellant calling the witness "*if they're under subpoena to do that*," which was not the case.

In addition, even though appellant was defending himself, his propia persona status did not entitle him to special consideration for a continuance. (*People v. Redmond* (1969) 71 Cal.2d 745, 758.) Appellant acknowledged having had contact with an investigator. He stated that the investigator had subpoenaed witnesses for him, although no witnesses appeared. The logical witness to subpoena would have been the fingerprint expert, since appellant had questioned Deputy Nohles about the fingerprint evidence at

the preliminary hearing. Nevertheless, appellant had not done so in the three months since the preliminary hearing and had thus failed to demonstrate due diligence. Appellant was given adequate time to prepare his defense, and his failure to subpoena the fingerprint expert was not attributable to anyone but himself. His status as a propia persona defendant did not give him special privileges such as having hearsay evidence admitted because he had failed to subpoena a witness. (*People v. Redmond, supra,* at p. 758.)

Even assuming the trial court abused its discretion in denying a continuance, defendant fails to show prejudice and is not entitled to reversal. The value of the testimony by the fingerprint expert was minimal compared to the overwhelming evidence against appellant. He was seen leaving the bookstore with the books in his pants. The store clerk examined him closely with the purpose of identifying him if she lost track of him. When appellant picked up his back pack, the clerk was able to see the bindings of the books and identify which ones they were. The store clerk chased him while he held his groin area. Appellant was seen by another employee discarding the overly large sweatsuit he had been wearing. Appellant was identified in a field showup by three witnesses, and the books were found in a storage room in one of the buildings appellant had entered. Moreover, appellant still had the option of presenting the lack of fingerprint evidence to the jury during final argument.

We conclude the trial court did not abuse its discretion in denying appellant's request for a continuance at the end of trial, and no miscarriage of justice occurred. Appellant has not demonstrated a reasonable probability of a different outcome had the requested continuance been granted. Therefore, reversal is inappropriate. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. Cross-Examination of Forbes

A. Appellant's Argument

Citing Evidence Code section 780, subdivision (d), appellant contends that Forbes's receipt of information from campus police regarding the suspect's capture—

before she participated in a field identification—was relevant to her credibility as a witness. He claims that the jury might have received a significantly different impression of her credibility had appellant been allowed to continue with his cross-examination on this issue. Appellant argues that his Sixth Amendment right to confront witnesses against him was violated.

B. Proceedings Below

During cross-examination of Forbes, appellant questioned her as follows:

"[Defendant]: Okay. What made you go identify the suspect?

[Forbes]: Because to me it's just wrong to steal. And I'm sorry, it ticked me off.

[Defendant]: Okay.

[Forbes]: And yes, I will identify somebody that steals.

[Defendant]: So you identified the suspect because you thought it's wrong to steal, but how did you learn that the suspect was where he was at?

[Forbes]: The sheriffs came to get me.

[Defendant]: And when they came and got you, did they tell you how they apprehended the suspect?

[Prosecutor]: Objection. Relevance.

[The Court]: Sustained.

[Defendant]: Were you aware of how the suspect was apprehended?

[Prosecutor]: Same objection.

[The Court]: Sustained."

Appellant abandoned the question and went on to another matter.

C. Relevant Authority

Evidence Code section 780 states in pertinent part that "the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (d) The extent of his opportunity to perceive any matter about which he testifies.

Restrictions on cross-examination pertaining to the credibility of a witness do not violate a defendant's Sixth Amendment right to confrontation unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (*Van Arsdall*); *People v. Quartermain* (1997) 16 Cal.4th 600, 623–624.)

"'[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) Under California law, the trial courts have the same wide latitude. (*Ibid.*; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

D. Trial Court Ruled Properly

Appellant was not denied his right of confrontation, and no reasonable jury would have formed a significantly different impression of Forbes's credibility had appellant been able to further cross-examine her about what the deputies told her. (*Van Arsdall*, *supra*, 475 U.S. at p. 680.)

In the instant case, appellant states that his goal in asking the questions quoted *ante* was to determine the information Forbes received from police before she identified appellant during the field showup. Although he cites Evidence Code section 780, subdivision (d), dealing with the witness's ability to perceive, we can only assume appellant wished to show the jury that Forbes was influenced by what the police told her, and that her identification was therefore tainted. The manner by which appellant was detained was only marginally relevant to this issue, and, in light of the subsequent questioning of Forbes, there was no abuse of discretion in curtailing this line of questioning. Shortly after the questions quoted *ante*, appellant asked Forbes, "what was the suspect doing when you were identifying him?" Forbes stated that he was pulled out of a police car in handcuffs. She said that when they pulled appellant out of the police

car, they asked her specifically, '"Is that him?'" After looking at defendant's face, she replied that he was the one, and she was driven away.

Any inference that appellant wished to impart to the jury regarding Forbes's predisposition to identify him based on her communications with the deputies was accomplished by these questions about the showup. Regardless of what the deputies may have told Forbes, appellant was the only suspect sitting in the police car in handcuffs. Words were not necessary to create the kind of bias appellant wished to suggest by his questions.

We conclude that the trial court's rulings did not constitute an abuse of discretion or violate appellant's constitutional rights. Moreover, any abuse of discretion or error would have been harmless in any event due to the strength of the evidence of appellant's guilt, as we have previously discussed.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ